

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4088

77-4088

UNITED STATES COURT OF APPEALS
FOR THE SECOND DISTRICT

GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION,

Petitioner

AGAINST

BENEFITS REVIEW BOARD: DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAM: UNITED STATES DEPARTMENT
OF LABOR: HELEN SOBOLEWSKI, WIDOW OF JOSEPH
SOBOLEWSKI, DECEASED: AND THE ESTATE OF JOSEPH
S. SOBOLEWSKI, DECEASED: AND INSURANCE COMPANY
OF NORTH AMERICA,

Respondents

APPEAL FROM THE BENEFITS REVIEW BOARD

RESPONDENT CLAIMANT'S BRIEF

O'BRIEN, SHAFNER, GARVEY,
BARTINIK & STUART

MATTHEW SHAFNER

Attorneys for
Respondent-claimant
HELEN SOBOLEWSKI,
WIDOW OF JOSEPH S.
SOBOLEWSKI, DECEASED:
AND THE ESTATE OF
JOSEPH S. SOBOLEWSKI,
DECEASED,

TABLE OF CONTENTS

Statement of Facts.....	1
Issues.....	3
Argument.....	4

TABLE OF AUTHORITIES

Cases:

<u>Travelers Insurance Co. vs.</u> <u>Cardillo</u> , 225 F.2d 137 (2nd Cir. 1955), <u>cert. den.</u> , 350 U.S. 913 (1955)	4
--	---

Statutes:

33 U.S.C. 901, et. seq.	7, 10
-------------------------	-------

STATEMENT OF FACTS

The deceased, Joseph Sobolewski, worked at Electric Boat Division of General Dynamics in Groton, Connecticut as a pipecoverer or pipelagger, from November 28, 1955 to June 29, 1973. (15a, 16a). During this period of time he had extensive exposure to asbestos fibers and dust including the eating of lunch in asbestos polluted areas. (16a). Prior to April 1, 1973 General Dynamics was insured by the Insurance Company of North America. After April 1, 1973 General Dynamics became self-insured. (13a).

The decedent became disabled on June 29, 1973 and such disability continued until his death in October. (26a). On July 7, 1973 the diagnosis of probable carcinoma of the left lung with metastasis was made. (221a). After hospitalization in July, 1973 the decedent returned to work for about 5 days and then died of lung cancer in October, 1973. (4a). Prior to 1973 the decedent began to show signs which taken together with subsequent findings were determined to

constitute the disease of asbestosis. Subsequently the diagnosis of cancer was causally related to the prior asbestos exposure. (245a) Asbestosis was not discovered until after the death of the decedent and at the time of the formal hearing on October 14, 1975 was still denied by General Dynamics. (15a). The doctors were in agreement that the decedent's exposure to asbestos fibers as a cause of his disability and death was probably related to the early exposure rather than later exposure. None of the doctors however, could state when the asbestosis or lung cancer began.

ISSUES

- I. WHO IS THE RESPONSIBLE PARTY FOR PAYMENT OF
COMPENSATION BENEFITS: THE INSURANCE CARRIER
ON THE RISK PRIOR TO APRIL 1, 1973 OR THE
EMPLOYER AS A SELF-INSURED AFTER APRIL 1, 1973.

ARGUMENT

There is no essential dispute as to the factual basis in this case. The claimant was a pipelagger at Electric Boat Division of General Dynamics working extensively with asbestos materials. The claimant had undetected and undiagnosed cancer and asbestosis prior to April 1, 1973. His employment and continuing asbestos exposure extended beyond April 1, 1973. The detection and diagnosis of the cancer and its relationship to previous asbestos exposure was discovered after April 1, 1973. The claimant was never aware himself of the relationship between the cancer and asbestos exposure. (21a)

The responsible insurer is the last insurer during which time the claimant was exposed to injurious stimuli prior to the date claimant became aware he was suffering from an occupational disease. Travelers Insurance Co. vs. Cardillo, 225 F.2d 137 (2nd Cir. 1955), cert. den., 350 U.S. 913 (1955). Successive insurance carriers are treated in the same manner as successive

employers. Cardillo involved a group of cases that had been appealed involving several successive insurance carriers and in one case successive employers. Under Cardillo it must first be determined when the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment. Once this date is determined it must then be ascertained when the injured employee was last exposed to injurious stimuli prior to the date of awareness. The decedent was never made aware of the fact that he was suffering from an occupational disease arising naturally out of his employment. (21a). The question then arises under Cardillo whether there was injurious stimuli after April 1, 1973. It is uncontradicted that the decedent continued working at his regular occupation of a pipelagger and had continuous asbestos exposure after that date.

All parties would certainly agree that the stimuli in this case would be the asbestos fibers or dust to which the decedent was continuously exposed during his employment as a pipelagger at General Dynamics. The

parties would disagree as to what is meant by "injurious". If "injurious" means that which has caused injury which in turn caused disability, then asbestos exposure from April 1, 1973 through June 29, 1973 could not be classified as "injurious". If, however, "injurious" means that which is capable of producing injury or has the tendency to produce injury without regard to any specific length of time or disability, then the exposure in 1973 for the last few months of employment must be termed "injurious".

General Dynamics as a self-insured employer occupies the role of a successive insurance carrier which Cardillo indicated should be treated in the same manner as a successive employer. Clearly under Cardillo, General Dynamics as a self-insured employer should be held to be responsible.

General Dynamics contends that Cardillo is not applicable to this case because successive employers are not involved. Cardillo explicitly treats successive employers the same as successive insurance carriers so there appears to be a distinction without a difference.

General Dynamics also contends that the application of Cardillo is not appropriate to determine "date of awareness" which would only be applicable to the limitations of claims in Section 13 of the Act. 33 U.S.C. 913. This assertion is directly contrary to Cardillo which requires the injurious stimuli to be "prior to the date upon which the Claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment" Cardillo, supra, at 145. Although General Dynamics claims this case should be decided without reference to Cardillo it is difficult to see how this case can be resolved without following Cardillo or setting Cardillo aside.

The Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. 901 et. seq. requires the determination of responsible employers as among successive employers. The Act could not reasonably be administered otherwise. The same reasoning does not apply as to successive insurance carriers, however. How employers choose to insure their responsibilities under the Act is clearly up to each employer. If the Department of Labor or the Courts allow

the victims of industrial disease to be prejudiced by controversy as to coverage and determinations of responsibility between successive insurance carriers, the results would be completely contrary to the humanitarian spirit expressed by Congress through this Act. The Longshoremen's Act is not the proper forum to determine carrier responsibility.

The ramifications of the novel theory urged by the petitioner are somewhat obscured in this case where there could be legitimate dispute as to medical causation causing the long delay between the decedent's death and payment of compensation to his widow. The implications of adopting General Dynamics's position in regard to ascertaining responsible insurance carriers are better demonstrated in the case of General Dynamics vs. Sammie L. Gray, et al, Case No. 77-4049, now pending before this Court. In the Gray case the employer waited almost two years before compensation was made, mainly to determine who was the responsible carrier.

The petitioner claims that the date when injury began (when the lung cancer and/or asbestosis could be

ascertained in retrospect) is not important as long as it began some time prior to April 1, 1973. Such a rule might be easy to apply in this case, but it would be extremely difficult to apply in the Gray case where a 5 year latency period from exposure would expire next spring. It is submitted that the rule of Cardillo as applied in this case by the Administrative Law Judge and the Benefits Review Board best serve the implementation of the humanitarian purposes underlying the Longshormen's Act.

General Dynamics argues that if Cardillo is appropriate in this case the insurance carrier failed to meet its burden in proving exposure to injurious stimuli. It does not appear that any other reported case has ruled on who has the burden of proof of establishing last exposure to "injurious stimuli" under Cardillo. Logically it would seem that the employer who last exposed the injured employee to the potentially harmful stimuli (asbestos fibers) should be the one to bear the risk of non-persuasion. In this case it would be General Dynamics as a self-insurer after April 1, 1973

when the decedent continued to work with exposure to asbestos fibers and dust. Other employers have annual changes of insurance carriers or switch back and forth from the status of being self-insured to placing their risk with a private carrier. In order to adopt the position of the petitioner in this case, it would probably be necessary to develop some sort of apportionment rule or guideline. This would completely overrule Cardillo and be contrary to the spirit and intent of the Act. It would undermine the policy expressed in Section 14(a), (33 U.S.C. 914a) of the Act requiring the prompt payment of compensation.

Respectfully submitted,
THE RESPONDENT-CLAIMANT

O'BRIEN, SHAFNER, GARVEY,
BARTINIK & STUART

ATTORNEYS FOR
RESPONDENT-CLAIMANT

MATTHEW SHAFNER
July 22, 1977

